United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6038

B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JOSEPH ANTHONY CAMIRE, Infant, by his Father, JAMES ANTHONY CAMIRE and his Mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE, and GAIL MARIE CAMIRE, Individually,

Appellants,

-against-

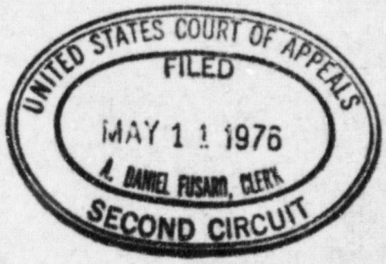
UNITED STATES OF AMERICA,

Appellee.

P/S

Docket No. 76-6038

REPLY BRIEF OF APPELLANTS



LIVINGSTON L. HATCH, ESQ.
Attorney for Appellants
Village Offices & Civic Center
Keeseville, New York 12944
(518) 834-7318

POINT I

THE APPELLANTS' CLAIM IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

A review of the notice of claim, complaint and affidavits will show that there have been no substantial changes of the basic facts or that there are any inconsistencies. If anything, there may be some variations which will occur when the conclusions contained in the notice of claim are developed by testimony. In a discovery case, where the filing of a notice of claim is not delayed for an inordinate period of time, it would seem that in order to entertain a motion for summary judgment, testimony of the entire facts would be necessary to meet the requirements of the summary judgment statute. In Brown v. U.S. (supra) the delay of almost ten years after the parents received knowledge at the Bethesda Naval Hospital as to what actually caused the blindness in the infant seems to not need testimony to entertain summary judgment. However, in the instant case, assuming the accrual of the cause of action is fixed on April 22, 1971, or shortly thereafter, the expiration date would have to be April 22, 1973. The claim was filed in January of 1974. The lower court did not fix an accrual date so there is no way to grant summary judgment when the beginning and the expiration are unknown. The only way to know when the cause of action accrued would be by taking testimony so that a trier of fact could determine when plaintiff, Gail Camire, had sufficient knowledge to know of the malpractice.

The government argues about a change in facts. The modern codes of pleadings call for notice pleadings rather than voluminous pleadings that existed under the older codes of pleadings. If the Assistant U.S. Attorney's position is to be given any thought, in order for the plaintiffs to have properly drawn the notice of claim, an entire book would have to have been written to give the day-by-day transactions of this young mother and her ill child. This lawsuit is similar to other lawsuits in which there may be some variation between the pleadings and the proof. This is the nature of litigation.

The government is trying to use semantics to succeed in its motion for summary judgment by using such terms as, "grave symptoms", that were exhibited to Dr. Marger. A review of the record will show that on pages 88 and 85 the infant's temperature ranged from 99^{o} to 102^{o}. The question of whether these are considered high temperatures is a medical question. The Assistant U.S. Attorney refers to the child's convulsions as another grave symptom. The term "convulsion" is a general category of reactions of the nervous system which could be no more than the stiffness of the muscles and a change in breathing habits, which could be a fever convulsion, or the total collapse in a spastic convulsion due to epilepsy. Again, this is a question of what the people observed and what the doctors determined and whether it is a grave symptom. The Assistant U.S. Attorney on his motion for summary judgment

will overemphasize these symptoms, but in the event the plaintiffs are successful, most assuredly the proof will be that the symptoms shown to Dr. Marger were not so grave.

It would appear that this lawsuit is being tried by papers and this is not the purpose of a summary judgment motion.

Summary judgment should be denied.

POINT II

THE GOVERNMENT'S CONTENTION CONTAINED IN POINT II IS WITHOUT MERIT.

A review of the Court's decision shows what the issues are that are raised on this appeal. There is no cross appeal from Judge Foley's decision raising the questions set forth in Point II.

Those items contained in Point II of the government's brief should not be considered on this appeal.

CONCLUSION

The order of the Hon. James T. Foley of November 9, 1975, should be reversed and the matter remanded to the lower court for further proceeding.

Dated: May 3, 1975.

Respectfully submitted,

Livingston L. Hatch, Esq.
Attorney for Appellants
Village Offices & Civic Center
Keeseville, New York 12944

UNITED STATE COURT OF APPEALS
SECOND CIRCUIT

JOSEPH ANTHONY CAMIRE, Infant, by his Father, JAMES ANTHONY CAMIRE and his MOTHER, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, Individually,

Appellants

-against-

UNITED STATES OF AMERICA,

Appellee.

AFFIDAVIT OF SERVICE

Docket No. 76-6038

STATE OF NEW YORK)
) ss.:
COUNTY OF CLINTON)

EVELYN A. HATCH, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at Willsboro, New York. That on the 4th day of May, 1976, deponent served the within Reply Brief of Appellants upon Assistant United States Attorney Richard K. Hughes, attorney for appellee in this action, at U.S. Attorney's Office, U.S. Post Office & Courthouse, Albany, New York, 12207, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States post office department within the State of New York.

Evelyn A. Hatch
EVELYN A. HATCH

Sworn to before me this
4 day of May, 1976.

Ernestine A. Hatch
Notary Public